

JUDICIAL STANDARDS COMMISSION
STATE OF MONTANA

FILED

AUG 16 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

INQUIRY CONCERNING)	
COMPLAINT OF:)	No. PR09-0639
)	
JUDICIAL STANDARDS)	
COMMISSION,)	RECOMMENDATION TO THE
Complainant)	SUPREME COURT OF THE
vs.)	STATE OF MONTANA
)	
LEROY NOT AFRAID,)	
Respondent.)	
)	

Hearing was held June 25, 2010, in Helena, Montana, in the Supreme Court courtroom before the Montana Judicial Standards Commission. Respondent Leroy Not Afraid was present, represented by William Eggers. Geoffrey R. Keller was present as the appointed prosecutor. Commission members presiding were: Hon Ed McLean (Chair), Vic Valgenti (Vice-Chair), Hon. Gary Day, and Sue Schleif. Respondent was duly sworn and testified. Exhibits 1 – 9 were marked and admitted (3, 4, 8 and 9 over objection by Respondent).

At issue was whether Respondent filed for election to a non-judicial elective public office while holding the position of Montana Justice of the Peace of Big Horn County, warranting disciplinary actions. Specifically, the

prosecution charged Respondent with violating the Montana Constitution, Article 7, §10, which states:

Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days.

(Ex. 5). It separately charged Respondent with violating various sections of the 2008 Montana Code of Judicial Conduct, specifically:

Rule 1.1 *Compliance with the Law.* A judge shall comply with the law, including the Code of Judicial Conduct.

Rule 1.2 *Promoting Confidence in the Judiciary.* A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 3.1 *Extrajudicial Activities in General.* A judge may engage in extrajudicial activities, except as prohibited by law or this Code.

“Law” encompasses court rules as well as statutes, constitutional provisions, and decisional law.

The prosecution noted that no actual actions of impropriety were alleged against Respondent, but that Respondent did not attempt to avoid the appearance of impropriety by his actions. The Commission previously determined Montana’s Constitution applied to Respondent, and further that the office of Crow Tribal Chairman was a non-judicial elective public office. (Order Denying Motion to Dismiss, dated March 11, 2010.)

At hearing the prosecution established through testimony of Respondent that he was elected Justice of the Peace for Big Horn County by general election in November 2006, and began his term of office January 1, 2007. Respondent was aware of the Montana Constitutional Oath of Office required by Article III (Ex. 1), and the statutory oath of office found at §3-10-202, MCA. (Ex. 2). Respondent confirmed he took the Oath of Office prior to starting his term and swore to “support, protect and defend . . . the Constitution of the State of Montana”; said Oath was filed with the Clerk and Recorder of Big Horn County (Ex. 3).

Respondent acknowledged he filed for the office of Crow Tribal Chairman on March 6, 2009. (Ex. 4). He still held the office of Justice of the Peace, Big Horn County, and did not forfeit his judicial position upon filing for election to that tribal office. This Commission sent Respondent a correspondence dated March 12, 2009, which he received, advising Respondent of the required forfeiture of his judicial position if he filed for a non-judicial elective public office, asking if he had so filed. (Ex. 6). Respondent acknowledged receiving a second letter from this Commission prior to March 20, 2009, addressed to his legal counsel, again advising him of the resign-to-run provisions of Article 7, §10. (Ex. 7).

Respondent advanced past the primary election of March 28, 2009 (Ex. 8), but did not forfeit his judicial position. He was not successful in the general election April 18, 2009 (Ex. 9), and to date has not forfeited his judicial position.

Respondent testified he resigned from several public offices when elected Justice of the Peace because of a potential conflict of interest: Lodge Grass School Board, several commissions, and the Montana Consensus Council. He was advised by several Justices of the Peace and City Judges at his initial training for Courts of Limited Jurisdiction that he needed to resign from the Crow Nation Legislature having now been elected Justice of the Peace. He testified he asked Calvin Wilson (sitting Big Horn County Attorney) and Georgette Hogan (Big Horn County Attorney elect) if he was required to resign his Crow legislative seat and understood from them that the Attorney General's Office declined to issue an opinion on the matter. He believed at the time this meant he did not need to resign his Crow legislative seat. He also believed years later this meant he was free to maintain his state judicial position after filing for election to the office of Crow Tribal Chairman despite his awareness of Article 7, §10. The Commission notes Respondent called neither Wilson nor Hogan as a witness at hearing, and did

not provide the Commission any written verification of any legal advice on the matter from either witness.

Respondent conceded that his jurisdiction as Big Horn Justice of the Peace geographically included lands that are both reservation and non-reservation. He conceded some tribal members voted for him for Crow Tribal Chairman and some voted for other candidates, both in the primary and then the general election. He attended candidate forums during his campaign where he understood certain voters supported him. He attended clan feeds where other attendees likely were supporters of his Crow Tribal Chairman election. He conceded that all voters for the Crow Tribal Chairmanship were potential future litigants or defendants before him as Justice of the Peace of Big Horn County.

Despite taking the Constitutional and statutory oaths of office to defend the Constitution of the State of Montana, and despite knowledge of the Constitutional forfeiture requirement of a judicial office if filing for non-judicial elective public office, and despite the Montana Code of Judicial Conduct prohibiting actions that potentially could create an appearance of impropriety, Respondent did not forfeit his judicial position contending the Crow Tribal Chairman position was not a "public elective office". He

additionally testified he would not forfeit his judicial office should he file for another elective tribal office in the future.

OPINION

This Commission previously determined the Montana Constitution and Montana Code of Judicial Conduct apply to Respondent while holding the office of Justice of the Peace of Big Horn County. It also determined the position of Crow Tribal Chairman was an elective public office as applied to Article 7, §10, of the Montana Constitution. The Commission noted neither the Montana Constitution nor the Code of Judicial Conduct prohibited Respondent from filing for a tribal non-judicial elective office, as long as he forfeited his Montana judicial position once he elected to do so.

At hearing Respondent conceded he took and filed the Oath of Office to “support, protect and defend . . . the Constitution of the State of Montana.” On March 6, 2009, while holding the position of Justice of the Peace, he filed for election of Crow Tribal Chairman, and did not forfeit his judicial position as required by the Montana Constitution. Further, he testified he will not forfeit any judicial position held if he files for a non-judicial elective tribal office in the future. By failing to forfeit his judicial position upon filing for election for Crow Tribal Chairman, Respondent

violated the Montana Constitution and Rules 1.1 and 3.1 of the Code of Judicial Conduct, warranting disciplinary action.

Separately, the Commission finds Respondent did not attempt to avoid the appearance of impropriety by filing and campaigning for the public elective position of Crow Tribal Chairman while maintaining his judicial office. His tribal campaign supporters and non-supporters are now potential litigants and defendants before him as Justice of the Peace as long as he holds that office. The appearance of favoritism, bias or prejudice toward a former campaign supporter or against a former campaign detractor now has the potential to emerge as long as he remains on the bench. The “resign-to-run” rule is found in nearly all jurisdictions, either by state Constitution or Judicial Canon or both. The Fifth Circuit Court of Appeals set forth the rationale for Louisiana’s statutes and judicial canons requiring judges to resign their position before announcing their candidacy for any non-judicial office.

The government has at least as great an interest in assuring the impartiality of judicial administration of the laws as in assuring the impartiality of bureaucratic administration of the laws. [Citations omitted]. As the Supreme Court has observed, the reality and the appearance of “political justice” are incompatible with the assumptions of a system of government of laws not men.

* * *

The resign-to-run rule is reasonably necessary to the state's vindication of these interests. By requiring a judge to resign at the moment that he becomes a candidate, the state insures that the judge will not be in a position to abuse his office during the campaign by using it to promote his candidacy. The appearance of abuse which might enshroud even an upright judge's decisions during the source of a hard-fought election campaign is also dissipated by requiring the judge to resign. He who does not hold the powers of the office cannot abuse them or even be thought to abuse them.

Even clearer is the reasonable necessity of the resignation requirement to the prevention of post-campaign abuse or its appearance. It is apparent that the prevention of post-campaign abuse calls for measures which are effective in the post-campaign period.

* * *

By requiring resignation of any judge who seeks a non-judicial office and leaving campaign conduct unfettered by the restrictions which would be applicable to a sitting judge, Louisiana has drawn a line which protects the state's interest in judicial integrity without sacrificing the equally important interest in robust campaigns for elective office in the executive or legislative branches of government.

This analysis applies equally to the differential treatment of judges and other office holders. A judge who fails in his bid for a post in the state legislature must not use his judgeship to advance the cause of those who supported him in his unsuccessful campaign in the legislature.

Morial v. Judiciary Comm'n of the State of Louisiana (1977), 565 F.2d 295, 302-306.

The Supreme Court of Hawaii has similarly set forth the objectives of its constitutional "resign-to-run" requirement:

First, the resign-to-run law encourages elected public officials to devote themselves exclusively to the duties of their respective offices. Second, the resign-to-run amendment reduces the possibility of public subsidies for officials merely using public office as a “stepping stone” to higher office. Third, the provision prevents abuse of office before and after an election. Fourth, it protects the expectations of the electorate in voting a candidate into office. Fifth, the resign-to-run amendment ensures loyalty of public servants to their electorate. Finally, the rule minimizes the possibility of disruptions in public office and reduces the need for special elections.

Blair v. Harris (2002), 98 Hawaii 176 at 181, 45 P.3d 798 at 803.

The same rationale and objectives exist for Montana’s Constitutional resign-to-run requirement. The Commission does not find any evidence of actual impropriety by Respondent, but notes a distinct potential for claims of the appearance of impropriety because Respondent did not forfeit his judicial position when filing and running for the non-judicial public elective office of Crow Tribal Chairman. In so filing, and repeatedly refusing to forfeit his judicial position, despite communications by this Commission, Respondent did not attempt to avoid the appearance of impropriety in violation of Rule 1.2 of the Code of Judicial Conduct, warranting disciplinary action.

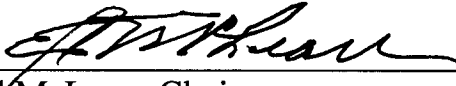
Respondent claims he was advised by the Big Horn County attorney’s office that he need not resign his existing Crow Nation legislative seat after being elected to his judicial position. However the Commission notes this

purported advice is substantially different from counseling Respondent he need not forfeit his existing judicial position once filing for a new elective public non-judicial office. Although this advice was not corroborated or verified, the Commission sees this as a mitigating factor regarding the disciplinary action warranted.

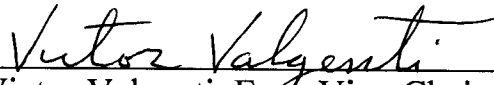
RECOMMENDATION

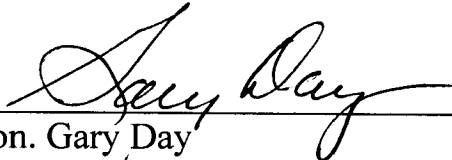
It is the unanimous recommendation of this Commission that Respondent receive a **Public Reprimand** by the Supreme Court of the State of Montana. The Commission would request the Supreme Court to require the Respondent to pay the costs of the proceeding before the Judicial Standards Commission. Should Respondent file for non-judicial elective public office in the future (tribal or non-tribal), and refuse to forfeit any judicial position held at that time, the Judicial Standards Commission will immediately file a formal complaint with the Montana Supreme Court and request immediate suspension from office while the complaint is pending.

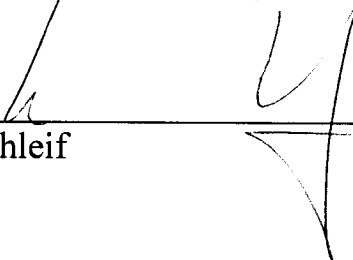
DATED this 5th day of August, 2010.



Hon. Ed McLean, Chair


Victor Valgenti, Esq., Vice-Chair


Hon. Gary Day


Sue Schleif

CERTIFICATE OF MAILING

I hereby certify this 16th day of August, 2010, I served a copy of the foregoing *Recommendation to the Supreme Court of the State of Montana* by mailing a copy thereof, postage prepaid to:

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